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UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

Civil Action No. 7106

MURRAY MESTER AND MEYER MESTER,
Plaintiffs,

against

NITED STATES OF AMERICA, FEDERAL COM-MUNICATIONS COMMISSION, ARDE BULOVA, HARRY D. HENSHEL, AND RICHARD E. O'DEA,
Defendants

TATEMENT AS TO THE JURISDICTION OF THE UNITED STATES SUPREME COURT ON APPEAL TO REVIEW THE JUDGMENT IN QUESTION.

The plaintiffs-appellants, having presented this day their tition for appeal, now file this their statement of the sis upon which it is contended that the Supreme Court the United States has jurisdiction on a direct appeal to view the judgment in question, and should exercise such risdiction in this case.

(A) The Statutory Provision Believed to Sustain the Jurisdiction

This action was brought by plaintiffs to set aside and join the enforcement of a decision and order of the Fed-al Communications Commission refusing to consent to

transfer by defendants Bulova and Henshel to the plaintiffs of stock in Wodaam Corporation, a New Jersey corporation, which transfer would have vested in plaintiffs substantial ownership and control of radio station WOV in New York City. Section 310(b) of the Communications Act of 1934 forbids such transfer in the absence of consent by the Commission.

Section 402(a) of the Communications Act of 1934 makes applicable to suits to enjoin, set aside or annul any order of the Federal Communications Commission (with certain exceptions immaterial here) the provisions of the Act of October 22, 1913, c. 32, 38 Stat. 219, 28 U. S. C. Sec. 41(28), 43-48, known as the Urgent Deficiencies Act.

The jurisdiction of the Supreme Court is based on Section 210 of the Judicial Code, 28 U. S. C. Sec. 47a, which provides that "A final judgment or decree of the district court in the cases specified in Section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree . . ."

(B) Order of the Federal Communications Commission, the Validity of Which Is Involved

The opinion and order of the Federal Communications Commission dated March 4, 1946, the validity of which is involved, is attached hereto as Appendix A.

(C) Date of Judgment and Date of Application for Appeal

The final judgment here sought to be reviewed was entered and spread of record on March 27, 1947.

The petition for appeal herein was presented and filed on May 23, 1947.

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(D) Nature of the Case

Pursuant to the provisions of Section 402(a) of the Communications Act of 1947, the plaintiffs herein filed on June 21, 1946, a complaint in the United States District Court for the Eastern District of New York praying that the court annul, set aside and enjoin the enforcement of the order of the Federal Communications Commission set out in Appendix A and for other appropriate relief. On August 22, 1946, the defendants, the United States of America and the Federal Communications Commission, filed a motion for summary judgment in the matter. On September 28, 1946, the defendants, Bulova and Henshel, filed a motion to dismiss the action. After the submission of briefs, a court of three judges, convened pursuant to the Urgent Deficiencies Act, heard argument upon these motions on December 19, 1946. The opinion and findings of the court granting the motion for summary judgment of the defendants, the United States and the Federal Communcations Commission, and denying the motion to dismiss of defendants, Bulova and Henshel, were filed on February 4, 1947. A copy of that decision is attached hereto as Appendix B. Judgment upon that decision was entered and spread of record March 27, 1947.

(E) Decisions Believed to Sustain the Jurisdiction

The following decisions of this Court are believed to sustain the jurisdiction of the Supreme Court of the United States on a direct appeal to review the judgment here in question:

A. T. & T. Co. v. *United States,* 299 U. S. 235;

Rochester Telephone Corp. v. *United States,* 307 U. S. 125;

F. C. C. v. *Columbia Broadcasting System of Calif. Inc.,* 311 U. S. 132;

Columbia Broadcasting System, Inc., v. *United States*, 316 U. S. 407;

National Broadcasting Co. Inc. v. *United States*, 319 U. S. 190.

(F) Grounds upon Which It Is Contended That the Questions Involved Are Substantial

The court below in effect upheld the Federal Communications Commission in its refusal to consent to the transfer of control of Station WOV to the appellants under the provisions of Section 310(b) of the Communications Act of 1934 upon two of the three grounds asserted by the Commission for its action. The first of these is that "the transferees revealed an extreme lack of candor in testifying under oath as to their numerous difficulties with various governmental bodies." The second, in effect, is that "the transferees, in carrying on their edible oil business, have violated and disregarded the regulatory laws of the states and the federal government"; that "the violations have been numerous and extended over their entire business career," and that "many of these violations were clearly not matters of inadvertence." The court below held among other things, that there was substantial evidence in the record to support these conclusions of the Commission, that the Commission had authority under the Communications Act to withhold their consent upon such findings and that the action of the Commission was not arbitrary, capricious or an abuse of discretion.

We respectfully urge the following contentions with reference to each of these conclusions of the Commission:

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A. "The Transferees Revealed an Extreme Lack of Candor in Testifying under Oath as to Their Numerous Difficulties With Various Governmental Bodies."

1. A standard of fitness as a radio station licensee based upon the degree of "candor" of the applicant under harsh cross-examination with respect to matters not covered by the Commission's application form is arbitrary and capricious in the absence of any finding of willful misrepresentation or concealment or a disregard for the truth. In this connection, the Commission found in its *proposed* decision that the "transferees" misrepresented and concealed the facts concerning their civil litigation with regulatory bodies. After argument, the Commission *withdrew those findings* and substituted those presently in dispute. Accordingly, the failure of the Commission to find in its final opinion any misrepresentation or concealment was not a matter of oversight, but a result of carefully considered judgment based on argument. Furthermore, this is the only case where the Commission has employed such a test of fitness in the absence of any finding of willful misrepresentation or concealment.

2. With reference to Meyer Mester, one of the two individual transferees, there is *literally no evidence* in the record to support this irresponsible conclusion. Meyer Mester did not testify on direct examination, nor was he cross-examined, upon "their numerous difficulties with various governmental bodies."

3. With reference to Murray Mester, the other individual transferee, there is not sufficient evidence in the record taken as a whole, to support the drastic conclusion of the Commission. Although the Commission may point to certain short passages snatched from the context of the transcript of the cross-examination of Murray Mester concerning

matters happening over 13 years ago as an indication of *inconsistency*, the record as a whole shows clearly that they are a result of confusion of memory under caustic cross-examination.

4. This conclusion, which brings the appellants into disrepute in their own community, and which is based upon no evidence with respect to Meyer Mester, and upon a distortion of the record with respect to Murray Mester, indicates such prejudice upon the part of the Commission as to have denied to the applicants a fair hearing within the meaning of the Constitution. The matter upon which this conclusion is made is not the kind which should be entrusted solely to the discretion of "experts" in the field, *i. e.* left solely to administrative judgment. The conclusion is one going to the character of the appellants, and the evidence of prejudice in this sweeping conclusion embracing both of the applicants throws such doubts upon the other conclusions of the Commission as being uninfluenced by this prejudice that we submit that the appellants are entitled as a matter of constitutional right to have a decision upon a new record free of this blight.

B. "The Transferees, in Carrying on Their Edible Oil Business, Have Violated and Disregarded the Regulatory Laws of the States and the Federal Government. . . . The Violations Have Been Numerous and Extended Over their Entire Business Career. . . . Many of These Violations Were Clearly Not Matters of Inadvertence."

1. These are findings made with respect to an enterprise which the record shows has, in the past several years, done over a $3,000,000 volume of food business and is now doing such business in food under the regulatory laws and with the sanction of the federal government, the governments

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of the forty-eight states and foreign governments. These findings concern a business against which, in fourteen years the record shows there has been no criminal conviction and no judgment *in personam* obtained by any government agency, state or federal. These are findings concerning an enterprise which the record shows has never had any food product condemned as unfit in fourteen years of business. These findings are based upon the following proceedings as shown by the record:

(a) One action *in rem* by the Food and Drug Administration *in 1933* involving 16 cases of salad oil for insufficient label, which Murray Mester, doing business individually, shipped in interstate commerce as a broker for the packer of the oil.

(b) Four *in rem* actions by the Food and Drug Administration in *1933 and 1934,* involving in total 38 cases and 214 cans of salad oil and all revolving about the issue as to the sufficiency of the same label. The undisputed testimony indicates that the issue involved the entire salad oil industry at the time. In fact, the Mester's claimed and had returned for relabeling after settlement of the issue, 9 cases and 180 cans of the oil in dispute. Further, the substitute label adopted by the appellants after industry-wide meetings has been in use for the past 14 years.

(c) Two *in rem* actions, one by the Federal Food and Drug Administration, the other by the equivalent Connecticut body *in 1944,* involving in total 2334 cans of oil, because some of the cans were short in volume (measured by weight) by less than an ounce in 128 ounces. The undisputed testimony in the record shows that the variance resulted because (1) the machines which filled the cans filled them by weight, (2) the cans during the war varied in weight because they were made from scrap metal by an

electrolytic process and (3) the cans were filled by unexperienced women help. The Mesters claimed the oil involved in the dispute and repacked it.

(d) A *stipulation* between the appellants and the Federal Trade Commission *in 1943* to cease and desist certain advertising with reference to salad oil. The undisputed evidence in the record shows that the Mesters chose not to contest the matter; they had ceased packing the oil in question over a year before the dispute was settled because of war conditions. Furthermore it was pointed out to the Federal Communications Commission that the Federal Trade Commission will not, as a matter of policy, enter into any stipulation where that body has reason to believe the action involved is willful.

(e) Finally, a civil proceeding by the OPA against the appellants involving the issues (1) whether the Mesters properly applied the regulation concerning the adoption of the prices of their nearest competitor for products not produced in the base period and (2) the proper posting of prices on the premises. The OPA, having asked $60,000 in damages, settled the suit out of court for $3,742.05. In this connection, it is interesting to note that it was apparently the policy of the OPA to file suit before discussing disposition by settlement.

2. This record, in the light of the volume of business done by the appellants over a period of 14 years in a field of endeavor as closely regulated as the food industry does not support a conclusion that the plaintiffs have intentionally "violated and disregarded" the law with all the implications of that conclusion.

3. This record, in the light of the volume of business done by the plaintiffs over a period of 14 years in a field of endeavor as closely regulated as the food industry, does not

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support the conclusion that the "violations" have been numerous and extended over their entire business career. From 1934, one year after the plaintiffs began their packing business until 1943, the evidence in the record shows no litigation with regulatory bodies. From 1943 to date, the record shows that war conditions and the complicated and new regulations made necessary because of the war were responsible for the three matters of litigation relied upon by the Commission for its conclusion.

4. This record does not support the conclusion that "many of these violations were clearly not matters of inadvertence." This conclusion is a serious charge, amounting as it does to an accusation of crimes against the appellants. Even in an administrative proceeding, it would seem that such charges should not recklessly be made. Yet this record shows clearly that none of the proceedings relied upon by the Commission to establish this charge involved any issue of intent, nor did they result in any judgments—even civil—against the appellants. Furthermore, the record shows that, at least in one instance, the Food and Drug Administration, after administrative hearing reached the positive conclusion not to proceed against the appellants personally. In every case, the regulatory bodies directly involved had the legal machinery available to bring criminal proceedings against the appellants personally and did not do so.

Without taking the trouble to designate which of the proceedings described in the opinion resulted from the alleged willful conduct of the appellants, the Commission disregarded the only evidence in the entire record going to the question of intent in those proceedings: the undisputed explanations of the appellant, Murray Mester. Assuming the Commission could, if it pleased, disregard that testimony, there is no other evidence in the record on that issue which

would support the acusations against the appellants expressed by this conclusion of the Commission.

5. The standard of fitness established in this case, based upon the civil litigation with regulatory bodies described above, is arbitrary and capricious and an abuse of discretion in that it has not been applied with reference to licensees and transferees approved by the Commission both *prior to* and *subsequent to* the hearing in this case.

6. The conclusion of the Commission importing an accusation of crimes against the appellants upon this record indicates such prejudice on the part of the Commission as to have denied to the appellants a fair hearing within the meaning of the Constitution and,

7. In the absence of any proper finding of willful misconduct, the question of civil litigation with other governmental agencies becomes irrelevant in the determination of "character" for the purposes of the Communications Act of 1934.

Respectfully submitted,

PHILIP J. HENNESSEY, JR.,
816 Connecticut Avenue,
Washington 6, D. C.,
BERNARD NOSKIN,
16 Court Street,
Brooklyn, New York,
Attorneys for Plaintiffs-Appellants.

May 21, 1947.

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APPENDIX A

90421

March 5, 1946

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON, D. C.

In re Application of B-209

Docket No. 6598

File No. B1-TC-362

ARDE BULOVA and HARRY D. HENSHEL, *Transferors,*

and

MURRAY MESTER and MEYER MESTER, *Transferees*

For Transfer of Control of WODAAM Corporation, Licensee of Station WOV, New York City

APPEARANCES:

Horace L. Lohnes and *Sanford H. Cohen*, on behalf of Arde Bulova and Harry D. Henshel, transferors, and Wodaam Corporation, licensee; *Philip J. Hennessey, Jr.*, and *Bernard Noskin* on behalf of transferees; *Charles B. McGroddy, Jr.*, and *Lynne A. Warren* on behalf of Richard E. O'Dea, intervener; *Benjamin L. Lasky* on behalf of Hyla Kiczales; *R. H. Hyde* and *Leonard Marks* on behalf of Federal Communications Commission.

By the Commission (Jett, Commissioner, concurring in the result; Denny, Acting Chairman, and Wills, Commissioner, not participating either in the consideration or decision):

DECISION—Findings of Fact

1. This proceeding arose upon the application of Arde Bulova and Harry D. Henshel, transferors, and Murray Mester and Meyer Mester, transferees, for the Commis-

sion's consent to the transfer of control of Wodaam Corporation, licensee of Station WOV, New York, N. Y. The application was filed on December 31, 1943. It was returned to the applicants with a request for further information and was refiled with the necessary supplemental data on February 8, 1944. Additional financial data was requested by the Commission which the applicants furnished on March 25, 1944. On May 9, 1944, the Commission designated the application for hearing for the following reasons set forth in the Notice of Hearing:

1. To obtain full information with reference to the qualifications of the proposed transferees.

2. To obtain full information with reference to all contracts, agreements or understandings which have been executed or entered into relative to the transfer of stock in the license corporation.

3. To obtain full information with respect to any relationship operation of Station WOV would have with other business enterprises of the proposed transferees, including information as to the extent to which WOV would be used for furtherance of other business interests of the transferees.

4. To obtain full information with respect to the service proposed to be rendered by Station WOV under the control of proposed transferee.

5. To obtain full information as to whether or not, under the control of proposed transferees, the time of Station WOV would be sold through time brokers or through other arrangements of similar character.

6. To obtain full information as to the manner in which the operation of Station WOV would be supervised.

7. To determine whether, in view of the facts adduced under the foregoing issues, public interest would be served by granting the instant application.

2. On July 5, 1944, Richard E. O'Dea, holder of a 25 per cent stock interest in the licensee corporation, was per-

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mitted to intervene in the hearing thereafter held before Commissioner Clifford J. Durr, on July 6 and 7, 1944. The hearing record was held open at the request of the parties for the purpose of obtaining and submitting various depositions, the last two of which were submitted on September 26, 1944. Thereafter, the applicants submitted their proposed findings of fact and conclusions. On November 10, 1944, the intervenor filed proposed findings and conclusions.

3. Station WOV operates on 1280 kc. with 5 kw. power. It is licensed to Wodaam Corporation, incorporated in New Jersey. The entire authorized, issued and outstanding stock of the licensee corporation consists of 200 shares of Class A and 1,000 shares of Class B common stock of the same par value. This application requests consent of the Commission to the transfer of control of Wodaam Corporation from the transferors to the transferees pursuant to agreements dated March 18, 1942 and November 11, 1943, providing for the conveyance to Murray and Meyer Mester of 600 shares of Class B stock in Wodaam Corporation owned by Arde Bulova [1] and the entire stock owned by Harry D. Henshel in two holding companies, B. I. O. W. Broadcasting Corporation and WAAM, Inc., which together own 100 [2] shares of Class A and 200 shares of Class B stock in Wodaam. The intervener, O'Dea, owns and will retain the rest of the Wodaam stock consisting of 100 shares, Class A, and 200 shares, Class B.

4. Under the first agreement of March 18, 1942, the transferors agreed to sell their interests in Wodaam Corporation and the holding companies to the transferee brothers at a price of $300,000. The transferees proposed to take, as individuals, equal amounts of the stock involved. Previously existing corporate merger agreements between O'Dea, WAAM, Inc. and Wodaam Corporation dated June 3, 1933, and between Wodaam and W. B. O. Broadcasting Corporation dated August 16, 1938, provided that the Wodaam

---

[1] Includes three qualifying shares held in the names of others acting as corporate officers.

[2] Includes two qualifying shares held by individuals.

stockholders would "not sell their stock unless first offered" upon the same terms to the remaining stockholders of Wodaam for a period of 60 days. In view of this provision, the transferors, on March 19, 1942, obtained a waiver from O'Dea releasing his preferential 60-day right to purchase the stock on the same terms as those provided in the March 18, 1942, agreement. Subsequently, on March 30, 1942, the transferors and transferees filed an application with this Commission requesting the transfer of control of the licensee corporation to the Mester brothers. On July 14, 1942, the Commission designated this application for hearing, whereupon, on motion of all of the parties to the proceeding, the Commission on August 18, 1942, granted their request to dismiss the application without prejudice.

5. On November 23, 1943, the Commission, after having issued advance notice, adopted its Rule 3.35 prohibiting multiple ownership of stations in the same primary service area except upon a showing of public interest, convenience and necessity. Inasmuch as the transferors, Bulova and Henshel, own a controlling interest in Greater New York Broadcasting Corporation, the license of Station WNEW which operates in the same primary service area as that served by WOV, the transferors and transferees executed another contract on November 11, 1943 "restoring" the sales agreement of March 18, 1942, and retaining the same sales price of $300,000 but modifying several contract provisions in certain respects, such as providing for new instalment payment dates. No further waiver of option was obtained from Richard O'Dea with respect to his claim of preference under the merger contracts of June 3, 1933, and August 16, 1938. Upon learning of the agreement of the transferors and transferees to "restore" the March 18, 1942 sale, O'Dea, on December 24, 1943, after stating his position at a Board of Directors meeting of Wodaam Corporation on December 22, 1943 formally revoked in writing his waiver of option agreeing and consenting to the sale referred to in the agreement of March 18, 1942. Thereafter, on December 31, 1943, pursuant to the November 11, 1943 agreement, the applicants filed the instant application with the Commission for consent to the transfer of the cor-

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porate control of WOV. O'Dea, who has been actively connected with radio station operations since 1925, was subsequently allowed to intervene and opposes transfer of control of the corporation to the Mester brothers on the ground that it would jeopardize his interest and is not in the public interest.

6. Under the schedule submitted at the July 1944 hearing, Station WOV operates daily, except Sunday,[3] from 6:45 a. m. to 12:00 midnight. Out of a broadcast day of 17 hours and 15 minutes, about 13 hours or approximately 75 per cent of the WOV broadcast time on Monday through Friday is devoted entirely to commercial programs, while on Saturday 83 per cent of the programs are sponsored. In addition, almost all of the "sustaining time" is preceded or interspersed with 2 or 3 commercial spot announcements each 15 minutes. In view of the spot rates charged by the station, the broadcast revenue is thus substantial from "sustaining" as well as commercial time.

7. During the first six months of 1943, the station suffered operating losses of $8,600 plus depreciation charges of $15,600, or a net loss of $24,200. The financial statement supplementing the application shows a net loss of $37,377 for the year which includes depreciation charges of $30,693. During the first six months of 1944, the station returned an operating profit of $25,200 with depreciation charges of $15,600, leaving a net profit of $9,600 for that period. Although expenses as a whole increased in 1944, an increase in income of 45 per cent over 1943 resulted in the change to a profit status.

8. From 8:30 a. m. to 6:00 p. m. the station's programs are entirely in the Italian language. It appears that approximately 14 per cent of the population in the WOV primary service area, or 1,780,024 persons, are of Italian extraction while some 323,713 persons in the secondary area are Italian. In this connection, WOV has received various

[3] WOV does not operate on Sundays because the 1280 kc frequency in the same service area is assigned on that day to Station WHBI, Newark, New Jersey.

awards for its program service and received the Variety plaque for "fostering racial goodwill and understanding" during the year 1943.

9. The station does not dispose of broadcast time to time brokers for resale but nevertheless approximately 90 per cent of the programs are prepared by advertising agencies subject to station review and monitoring. The Balbo Oil Company, owned by Murray and Meyer Mester, sponsors a 15-minute Italian musical program on WOV six days a week. Four times each weeknight, in five-minute periods, the station presents a syndicated program in English called "People Know Everything", wherein persons selected from the telephone book are called and awarded money if they can answer certain questions correctly. Without, deciding whether this program is a lottery, it is a program designed to attract listeners by prizes rather than by quality of content. The program, purchased from a producer in Chicago, is carried independently of WOV by numerous other stations.

10. Murray and Meyer Mester were not born in the United States but immigrated to this country as minors and derived citizenship through the naturalization of their father. They are largely "self-educated." Since 1933, they have been engaged as partners in the edible oil business, first doing business under the name of the Modern Packing Company and subsequently, and at the present time, under the name of the Balbo Oil Company. They are not engaged in any other business except the business of producing, processing and selling edible oils. Murray Mester's net worth is in excess of $548,000, and Meyer Mester's net worth exceeds $500,000. The assets of the Balbo Oil Company, which are equally divided between the Mester brothers and are included in their net worth, exceed its liabilities by some $730,000.

11. The Mester brothers have never had an interest of any sort in a broadcast station license or in the management of a radio station. However, at the beginning of their oil business in 1933, and for several years thereafter, Meyer Mester arranged for their radio advertising on station-

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prepared programs. Five or six years ago they retained an agency which handles Italian programs for various sponsors, to produce their programs for them. Since that time, Meyer Mester has discussed program propositions with the agency and has approved or disapproved program matters in certain instances. For at least the last nine years the Balbo Oil Company has sponsored an Italian language program on WOV running generally 15 minutes each day. At the time of the hearing, Balbo Oil was also sponsoring programs and spot announcements on eight other stations in the Italian language, on one station in the Spanish language, and on one station in Greek.

12. The Mester brothers have not made any definite plans for the operation of WOV in the event that this transfer is granted but merely plan to continue the present policies of the station after acquiirng control of the license. They plan to continue the same sales policies under a uniform rate card; they definitely do not intend to sell time to time brokers for resale; they plan to continue to sell time to other edible oil companies which now advertise on the station; they do not contemplate increasing the use of Station WOV as an advertising medium for Balbo Oil; they do not seek to identify the station with their oil business; they generally plan to render the same service that is now being rendered; they propose to retain present management and personnel as far as possible; and they expect to become acquainted with the operations first before initiating any changes. Both expect to devote some time personally to the supervision of the station. Without having arranged to retain any persons in particuiar they plan to employ men "who would know what is what." They also expressed a vague and indefinite proposal to seek the advice of an advisory board, as yet unselected, to aid in determining station policy. They tentatively propose to have prominent men in the Italian community present talks on subjects such as Americanization and intend to encourage the forum type of discussion. They "believe in selling more time" as a means of increasing the profits of the station.

13. Murray Mester showed no knowledge whatsoever of the Communications Act of 1934, or of the Rules and Regu-

lations of the Federal Communications Commission, and has neither examined nor been advised on the laws relating to the licensing and operation of standard broadcast stations.[4] The Mesters have made no effort to interest those who are now employed by the station to continue in their present employment if the transfer is granted, and, in fact, had not even met Weil, the present manager of WOV, until a week before the hearing. Other than planning to act as directors themselves, they have not considered any other persons, as directors of Wodaam Corporation. Murray Mester did not understand the holding company arrangements through which they were to obtain control of part of the Wodaam stock, and had never even heard of the two holding companies, B. I. O. W. Broadcasting Corporation and WAAM, Inc. The Mesters had not met with, or spoken to, Richard E. O'Dea, the intervenor and holder of a 25 per cent stock interest in Wodaam Corporation, since the first negotiations in 1942.

14. Before the hearing, Commission counsel requested the transferees to have available at the hearing information relating to difficulties in which the Balbo Oil Company had become involved with the Food and Drug Administration and other governmental bodies. Instead of offering these records, Murray Mester testified, on direct examination, as follows:

> "Q. Now, have you ever been a party to a suit in a Federal court involving anti-trust or Federal Trade Commission proceedings?
>
> A. No, sir.
>
> Q. Have you ever been found guilty of felony or a crime involving moral turpitude?
>
> A. No, sir."

No further exposition or explanation was offered by the transferees during direct testimony. However, on cross-examination by counsel for the intervenor, Murray Mester

[4] In their application (p. 35), the transferees state that "They have a keen appreciation not only of the commercial but of the pedagogical and cultural possibilities of radio, and have always shown an interest in forums and discussions."

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admitted that a few months ago a shipment of "Cellini" Brand oil produced by the Mester Brothers and packed in cans labeled "one gallon net" was condemned by State of Connecticut food authorities for shortage of volume, that a forfeiture was imposed and that the balance of the shipment was returned for "cracking" and repacking. He also admitted, on cross-examination, that their oil company had trouble with the United States Food and Drug Administration in 1933 in connection with a brand of oil they produced and labeled "Tipo Lucca" because the name and olive branch design "was misleading" and "indicates a lucca type" of oil from Italy when this was not the case. In this connection, Murray Mester stated that there were only "two condemnations" involving their "Tipo Lucca" product, and that there were "no others other than those two cases." He also claimed that other packers of edible oils at that time were engaging in similar practices.

15. On cross-examination, he also referred to a California case arising in 1940 or 1941, stating that 1500 or 1600 cases of oil which they had shipped to California in cans labeled 80 per cent salad and 20 per cent olive oil, were required by the state authorities to be relabeled because it was found by the authorities that the olive oil content was only 15 per cent. In this case the Mester brothers were required to relabel the product, showing the particular amounts of cotton, peanut, olive and other oils contained in the cans. On further cross-examination, Murray Mester admitted that on September 9, 1943, he and his brother signed a stipulation with the Federal Trade Commission agreeing to cease and desist from representing that the oil they were selling contained 20 per cent pure olive oil. However, he stated at the hearing that at the time they signed the stipulation they did so for the reason that they had already discontinued packing the particular mixture because of the olive oil shortage. In mitigation of these difficulties with the food authorities, Murray Mester declared that "the Balbo Oil Company does today, and has for the past several years, approximately 3 million dollars a year business more or less. You state four or five facts which

are so horrible. We sell in Canada, Puerto Rico, Cuba and every state in the United States, merchandise."

16. As a matter of fact, the Mester brothers either individually or a partnership have been involved in at least 5 seizure and condemnation proceedings instituted by the United States Food and Drug Administration, as follows:

(1) Case No. 21651, *United States* v. *Sixteen Cans of Salad Oil*, filed August 30, 1933, in the United States District Court for New Jersey, involved, according to the notice of judgment, a product called "La Deliziosa" oil "which consisted chiefly of domestic cottonseed oil and which was labeled in a deceptive manner to indicate that it consisted of imported olive oil. Sample cans taken from the lot were found to contain less than 1 gallon, the labeled volume." On or about July 18, 1933, sixteen cans of "La Deliziosa" oil were shipped in interstate commerce by the Modern Packing Company, Brooklyn, New York. At that time, Murray Mester was doing business individually under the Modern Packing Company name. The cans were labeled "One Gallon Net Olio Finissimo Garantito La Deliziosa Brand Permiato All' Exposizione di Roma 1924 Italia" and bore the design of an olive branch and a medal bearing the picture of the King of Italy. The article was condemned by the Food and Drug Administration which alleged that the product was adulterated because it consisted essentially of cottonseed oil, whereas the label indicated that it was olive oil. Misbranding was alleged for that reason and for the further reasons that the article purported to be a foreign product when not, that the sample cans did not contain one gallon net, and that they failed to bear a clear, conspicuous statement of the quantity of the contents of the oil. On November 1, 1933, no claimant having appeared for the property, judgment of condemnation and forfeiture was entered, and it was ordered by the court that the product be destroyed by the United States marshal.

On cross-examination by Commission counsel, Murray Mester had denied that the Modern Packing Company ever "had a La Deliziosa Brand" of oil. But after persistent questioning and confrontation with irrefutable testimony and evidence, he finally admitted that he had sold "a little

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La Deliziosa oil" and admitted that his Modern Packing Company was the company described. He claimed that the article was packed by another man, one Salvatore Esposito, and that he himself merely shipped it. He stated, however, that he "sold this gentleman [Salvatore Exposito] the bulk oil that he used to pack." Murray Mester was asked whether he remembered appearing at a hearing relating to the seizure of the La Deliziosa products. He answered, "No. At no hearing of anything concerning the La Deliziosa products did I appear anywhere at any time in." An official member of the Interstate Division of the Food and Drug Administration, Federal Security Agency, who has been with the Administration for 15 years, testified that the official files of that Agency show that the La Deliziosa oil was seized shortly after August 30, 1933, that Murray Mester was then the sole owner of the Modern Packing Company, Brooklyn, New York, and that Murray Mester appeared at the hearing held in New York on October 28, 1933. The official also stated that in Federal Food and Drug Administration cases, the violation of law occurs in the shipment in interstate commerce of the adulterated or misbranded article.

(2) Case No. 21862, *United States* v. *29 Cans and 29 Cans of Salad Oil*, filed November 17 and 21, 1933, in the United States District Court for New Jersey, involved 58 cans of "Olio Fino Balbo Brand Tipo Lucca" shipped in interstate commerce on or about November 6 and 14, 1933, by the Modern Packing Company. The brand names, designs of olive branches and coat of arms with crown were carried on the label and an inconspicuous statement "Twenty Percent Olive Oil and Eighty Percent Salad Oil" appeared at the bottom of the label. The notice of judgment described the article as "a product which consisted chiefly of domestic cottonseed oil but which was labeled in a deceptive manner conveying the impression that it consisted of imported olive oil." On December 21, 1933, no claimant having appeared for the property, judgment of condemnation and forfeiture was entered, and it was ordered by the court that the product be destroyed by the United States marshal.

(3) Case No. 21963, *United States* v. *151 Cans of Salad Oil*, filed January 18, 1934, in the United States District Court for New Jersey involved 151 cans of "Olio Fino Balbo Brand Tipo Lucca" shipped in interstate commerce on or about October 2 and 16, 1934, by the Modern Packing Company. Designs of olive branches, coats of arms and crown, as well as the brand name appeared on the label. The article was described in the notice of judgment as "a product which was labeled to convey the impression that it was imported olive oil but which was found to consist largely of domestic cottonseed oil." The misleading impression was allegedly not corrected by the inconspicuous statement at the bottom of the label stating "Twenty Percent Olive Oil and Eighty Percent Salad Oil." On January 29, 1934, Murray Mester, trading as the Modern Packing Company, claimant, having admitted the allegations of the libel and having consented to entry of a decree condemning the property, judgment was entered ordering that the product be released to the claimant upon the payment of costs and execution of a $100 bond, conditioned in part that the product be repacked in cans labeled to show its true nature.

(4) Case No. 23325, *United States* v. *Five, One-Half Gallons Cans, et al., of Salad Oil*, filed October 4, 1934, in the United States District Court for New Jersey, involved a seizure of 5 half-gallon cans, 23 quarter-gallon cans and 15 gallon cans of salad oil shipped in interstate commerce on or about May 22, July 9 and August 7, 1934, by the Modern Packing Company. Some of the articles were labeled in part "Olio Fino Balbo Brand Tipo Lucca" and others "Olio Fino La Preziosa Brand Tipo Lucca", together with designs of olive branches and a coat of arms with crown. An inconspicuous statement appeared at the bottom of the labels stating "Twenty Percent Olive Oil Eighty Percent Salad Oil". The notice of judgment described it as "a product that consisted of domestic cottonseed oil and olive oil, consisting essentially of domestic cottonseed oil, which was labeled to convey the impression that it was olive oil of foreign origin." No claimant appeared for the property. On November 16, 1934, judgment was entered condemning

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the Balbo brand and ordering that it be destroyed. On December 20, 1934, the remaining lot was ordered delivered to charitable or relief organizations.

(5) Case No. 23378, *United States* v. *9 Cases and 29 Cases of Salad Oil*, filed October 23, 1934, in the United States District Court for the Eastern District of Pennsylvania, involved a seizure of 38 cases of salad oil shipped in interstate commerce by the Modern Packing Company on or about April 16, 1934. The article was alleged to be misbranded because of the statement "Olio Fine Brand Tipo Lucca" together with the designs of olive branches and coat of arms with crown appearing on the label. The notice of judgment described it as "a product consisting essentially of domestic cottonseed oil with some peanut oil and some olive oil present, that was labeled to convey the impression that it was imported olive oil." The misleading impression was allegedly not corrected by the inconspicuous statement at the bottom of the label stating "Twenty Percent Olive Oil, Eighty Percent Salad Oil". On November 8, 1934, S. Alioto & Sons, Philadelphia, Pennsylvania, a dealer, having appeared as claimant, judgment of condemnation and foreiture was entered, and it was ordered that the product be released under bond, conditioned that it be relabeled under the supervision of the Food and Drug Administration.

17. Recently the Mesters were involved in two cases, arising in Connecticut, one of which was referred to in Murray Mester's testimony. The one mentioned was a local case entitled *State of Connecticut* v. *Nichols Perrilli, d/b/a Perrilli Bros.*, filed on May 9, 1944, in the City Court of New Haven, City of New Haven, Connecticut. This case involved a shortage of volume in 2,239 one-gallon cans of Cellini Brand Olive Oil packed by the Balbo Oil Company. 1,999 cans were ordered returned to the claimant to be reprocessed by the Balbo Oil Company for repacking under state supervision, in cans properly marked as to net volume. 240 cans valued at $1,380 were condemned and forfeited to the use of the State of Connecticut. The Mester brothers were also the packers and shippers responsible in a Connecticut federal case entitled *United States* v. *95 Cans*,

more or less, of an article labeled in part "One Gallon Net Cellini Brand Pure Olive Oil • • •, case No. 4215 Adm., F. D. C. No. 12432, filed on May 25, 1944, in the United States District Court for Connecticut. These olive oil products, packed by the Balbo Oil Company in cans marked "One Gallon Net" were likewise seized and condemned because of a shortage of volume. In both Connecticut cases Murray Mester blamed the shortages on variances of weight in the containers caused by war conditions and on inexperienced help.

18. With respect to the Federal Trade Commission matter mentioned by Murray Mester on cross-examination, it appears that on September 9, 1943, Murray and Meyer Mester signed a stipulation of facts and agreement to cease and desist, F. T. C. No. 3728, which states in part as follows:

In the course and conduct of their business as described in Paragraph One hereof, Murray Mester and Meyer Mester, in connection with the sale and distribution of their said edible oil, have disseminated or caused to be disseminated, by United States Mails, the radio or otherwise in commerce as defined by the Federal Trade Commission Act, for the purpose of inducing or which were likely to induce the purchase of such product, or by other means for the purpose of inducing or which were likely to induce the purchase thereof in commerce as aforesaid, certain advertising representations in the Italian language, the English translations of which are as follows:

Balbo Oil always contains 20% pure olive oil;
The high percentage of pure refined olive oil it contains gives it a genuine fragrance which makes it very tasty.

As a matter of fact, said product did not contain "20% pure olive oil" or 20 percent olive oil or any approximation thereof;[5] and the statement "The high percentage of pure refined olive oil it contains" is misleading insofar as it tends or may tend to convey the belief or impression that

[5] Italics supplied.

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the olive oil content of the product is greater than is actually a fact.

It is Hereby Agreed by Murray Mester and Meyer Mester, individually or trading as Balbo Oil Company or under any other trade name or style, in connection with the sale and distribution in commerce as defined by said Act, or the advertising by means and in the manner above set forth of their cooking or edible oil, that they and each of them will forthwith cease and desist from representing that 20 percent of the content thereof consists of olive oil unless or until 20 percent does consist of olive oil; and from any representation the effect of which tends or may tend to convey the belief or impression that the olive oil content of said cooking or edible oil is greater than or in excess of actual olive oil content thereof.

19. Finally, at the time of the hearing, the Mesters were defendants in a proceeding brought against them by the Office of Price Administration, in which the Government charged that they had violated maximum price regulations in selling salad oil and had failed to keep a statement of ceiling prices available for inspection on the premises, as required pursuant to the Emergency Price Control Act of 1942. *Chester Bowles, Price Administrator, Office of Price Administration, Plaintiffs* v. *Meyer Mester and Murray Mester, Co-partners, doing business under the firm name and style of Balbo Oil Company, Defendants,* in the District Court of the United States for the Eastern District of New York, Civil No. 3746, filed April 7, 1944. We have been informed by the transferees' attorneys that on or about March 21, 1945, this action was disposed of by settlement under which the transferees paid the sum of $3,742.05 to the United States Government.

Conclusions

1. Under Sections 308(b) and 309(a) of the Communications Act of 1934, the Commission, in exercising its authority over applications for station licenses, is directed to examine into "the citizenship, character, and financial, technical, and other qualifications of the applicant to operate

the station," and "the purposes for which the station is to be used", and to hold a hearing on any application, if necessary, in order to determine whether "public interest, convenience, or necessity would be served by the granting thereof." Under Section 310(b), it is provided that the license and rights therein granted shall not be transferred in any manner, "or indirectly by transfer or control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing."

2. The transferees have come to this Commission seeking to assume the responsibilities and enjoy the privileges of a broadcast license but they have shown no understanding whatsoever of the provisions of the Communications Act and the rules and regulations of the Commission applicable to their operations. They showed only the vaguest acquaintance with the present operations of Station WOV and were equally vague as to their plans for its future operation in the event they should be approved as licensees. They expect to run the station as a secondary business investment relying primarily on others than themselves to carry out their license obligations. They propose to increase the station's profits "by selling more time" even though the station's schedule already shows that 75% of the broadcast time on week days and 83% on Saturdays is devoted entirely to commercial programs and most of the "sustaining" programs are heavily interspersed with commercial spot announcements. Cf. *In the Matter of R. R. Jackman, et al.*, 5 F. C. C. 496 (1938). From their own testimony, it must be concluded that they have no adequate conception of the public responsibilities of the station licensee which they are seeking to assume.

3. Also at the hearing, the transferees revealed an extreme lack of candor in testifying under oath as to their numerous difficulties with various governmental bodies. It is quite reasonable to assume that similar conduct could be expected of them in the submission of future reports to the Commission if the proposed transfer were granted. The

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interest of the Commission in station operation is a continuing one, and in carrying out its licensing authority the Commission must rely primarily on statements made by station licensees. "Caution must, therefore, be exercised to grant station licenses only to those persons whose statements are trustworthy." *In the Matters of Western Gateway Broadcasting Corp., et al.*, 9 F. C. C. 92, 102 (1942); *In the Matter of the Mayflower Broadcasting Corp.*, 8 F. C. C. 33, 338 (1940); *In the Matter of John H. Stenger, Jr.*, 8 F. C. C. 434, 444 (1940).

4. In addition, the transferees, in carrying on their edible oil business, have violated and disregarded the regulatory laws of the states and the federal government. Isolated and inadvertent violations of such laws are not, of course, in themselves, sufficient grounds for finding that an applicant is disqualified as a broadcast licensee. However, the violations of the applicants in the instant case have been numerous and extended over their entire business career. Many of these violations were clearly not matters of inadvertence. A broadcast license carries with it grave public obligations and a sense of public responsibility is therefore an essential qualification for any licensee. The sense of public responsibility which an applicant has shown in his private business dealings must therefore be given considerable weight in determining the degree of public responsibility which he, as a broadcaster, would bring to bear in his broadcast operations.

5. From a careful examination and review of all of the material facts relating to the technical and general qualifications of the transferees, we find that the applicants do possess those qualifications essential to operate Station WOV in the public interest. It is not necessary to show that the applicants have been adjudged guilty of criminal misconduct before finding that they are not qualified to hold a station license. It is sufficient to find in the instant case that the transferees have not established adequate technical, character, and other qualifications to convince this Commission that they are capable of being entrusted with the duties and privileges inherent in a radio station license.

6. The Commission concludes that transfer of control of Wodaam Corporation to the transferees would not serve the public interest, convenience, or necessity. The application, therefore, should be denied.

FEDERAL COMMUNICATIONS COMMISSION,
T. J. SLOWIE,
Secretary.

Adopted March 4, 1946.
Released: —— —, ——.
See Section 1.231 of the Commission's Rules of Practice and Procedure.

APPENDIX B

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

Civil Action No. 7106

MURRAY MESTER and MEYER MESTER, *Plaintiffs,*

February 4, 1947

against

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, ARDE BULOVA, HARRY D. HENSHEL, and RICHARD E. O'DEA, *Defendants*

Bernard Noskin, Philip J. Hennessey, Jr., Harry P. Warner, Attorneys for Plaintiffs. Segal, Smith & Hennessey, Of Counsel.

J. Vincent Keogh, United States Attorney for the Eastern District of New York. Benedict P. Cottone, General Counsel; Harry M. Plotkin, Assistant General Counsel, Federal Communications Commission. Frank J. Parker, Assistant United States Attorney. Max Goldman, Erich Saxl, Arnold D. Berkeley, Attorneys, Federal Communications Commission.

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Sanford H. Cohen, Attorney for Defendants Arde Bulova and Harry D. Henshel.

John V. Higgins, Attorney for Defendant Richard E. O'Dea. Charles B. McGroddy, Jr., Of Counsel.

Before Frank, Circuit Judge, and Moscowitz and Galston, District Judges

Moscowitz, D. J.:

This suit seeks to have a decision and order of the Federal Communications Commission adjudged unlawful and void and to have this Court set aside and enjoin the enforcement of the said order.

Section 310(b) of the Communications Act of 1934, Title 47, United States Code, provides that:

> "The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing."

Upon forms prescribed by the Commission and in accordance with its rules and regulations, application was made to it for its consent to a transfer by the defendants Bulova and Henshel to the plaintiffs of stock holdings by the former which would have vested in the purchasers the substantial ownership and control of radio station WOV in New York City. It is with reference to the decision and order of the Commission denying its consent to such transfer that relief herein is sought.

The jurisdiction of this Court is invoked under Section 402(a) of the Communications Act of 1934. By this section, the provisions of the Act of October 22, 1913, c. 32, 38 Stat. 219, 28 U. S. C. 41(28), 43-48, relating to the enforcement or setting aside of orders of the Interstate Commerce Commission are made applicable to suits to enjoin, set

aside or annul any order of the Federal Communications Commission, with a number of exceptions. The Act of October 22, 1913, known as the Urgent Deficiencies Act, provides for the convening of this three-judge district court. Review of orders in the instances enumerated as exceptions under 402(a) must be sought under 402(b) in the Court of Appeals of the District of Columbia. Scripps-Howard Radio *v.* Federal Communications Commission, 316 U. S. 4 (1942); Columbia Broadcasting System *v.* United States, 316 U. S. 407, 416 (1942). While all parties have conceded jurisdiction, this Court might on its own initiative find itself lacking in authority to entertain the suit. However, the language of Section 402(a) leaves little room for doubt that it authorizes a review by a three-judge court of any order of the Federal Communications Commission but those specifically excepted. It has been held that an application for the Commission's consent to a transfer is not the equivalent of an application for a radio license and that the exception of the latter from 402(a) does not authorize an appeal from the Commission's denial of consent to transfer to the Court of Appeals of the District of Columbia. Federal Communications Commission *v.* Columbia Broadcasting System of California, Inc., 311 U. S. 132 (1940).

It has been noted that under Section 310(b), the Congress has enacted that no transfer shall be effected unless the Commission "shall, after securing full information, decide that such transfer is in the public interest . . ." In pursuit of information which may be relevant to its determining whether or not a contemplated transfer is in the public interest, the Commission has adopted a rather lengthy form upon which it requires application for approval of a transfer to be made. In this case, after the filing of said form, a hearing was held, at which the plaintiffs were orally examined in quite some detail and had the opportunity to make known to the Commission all relevant facts.

The Commission found that the transferees were not possessed of a sense of public responsibility, which the Commission deems an essential qualification for any licensee, and concluded as a result thereof that the contemplated transfer would not be in the public interest. The existence

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of the facts comprising the basis for the decision is not in dispute. It seems that the plaintiffs have for some years been partners in a business marketing edible oils under the name and style of the Balbo Oil Company. Upon at least six occasions, their products were the subject of in rem proceedings in United States district courts to condemn them for weight shortages, false and misleading labeling or other deceptive practices. A Federal Trade Commission proceeding against them, based upon fraudulent advertising, resulted in their stipulation to a cease and desist order against them. A suit brought by the Office of Price Administration against them for selling oils at over-ceiling prices and failing to keep required records was settled by their payment to the government of some $3700.

As one of its reasons for denying consent, the Commission concluded from these facts that in the conduct of their edible oil business, handling a product for human consumption, the transferees had manifested a flagrant disregard for government regulations designed for public protection and that they had, in their deceptive practices, demonstrated the absence of a sense of public responsibility, which would make inadvisable, from the viewpoint of public interest, the transfer of a radio station and license to these intended purchasers. This determination was likewise based upon the second reason that the testimony of the transferees concerning their involvement with governmental bodies in these fraudulent practice proceedings was evasive and showed an extreme lack of candor upon their part, which made inadvisable their being accorded the public trust of operating a radio station. Even the cold printed minutes furnish ample justification for the findings made. The testimony of Murray Mester, one of the plaintiffs, indicates an obvious attempt to conceal and misrepresent the difficulties with the governmental bodies adverted to. Only when records were produced, did the witness show any inclination to recall or make known the facts involved. If lack of candor is a proper ground upon which the Commission may deny its consent to a transfer, it is amply demonstrated in this case.

The legal question is raised by the plaintiffs whether the Commission is empowered to take such factors into its con-

sideration. Their arguments seem to crystallize into two main contentions, based upon equally strained interpretations of the statute. Concerning the application forms which the Commission is authorized to require, Section 308(b) of the Act provides that they "shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical and other qualifications of the applicant to operate the station . . ." Plaintiffs say that the Commission is authorized to investigate into and base its decision upon only those matters which are specifically asked for upon the application form pursuant to a duly promulgated regulation issued by the Commission enumerating the matters it will or may consider in passing upon the character of an applicant. The only question concerning character which appears upon the application form is the inquiry whether the applicant has been convicted of a felony or of a crime involving moral turpitude. As the plaintiffs would have us construe Section 308(b), the absence of a regulation or general question concerning character would preclude the Commission from taking into consideration anything concerning an applicant's character, other than that which is evoked by the one question, namely, conviction for felony or of a crime involving moral turpitude.

Even if we were to confine ourselves to Section 308(b), we would be compelled to hold that the statutory specification therein of what the applicant shall set forth upon the form is not to be construed as limiting the scope of the subsequent hearing provided for in Section 309(a). It is designed to require compliance of applicants and the Commission would be justified in denying a license to a person who refused to "set forth" the matters required upon the application form. But where the Commission has determined, from the face of the form or from any other information in its possession, to refuse the license, a hearing is to be held at which examination of the applicant is proper not only as to matters raised by questions on the form but also as to those matters suggested by the independent information which the Commission possessed, subject only to the limitation of relevancy to the application being considered. It would indeed be far-fetched to hold that a general exami-

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nation of an applicant's character is sanctioned only if the form contains the inclusive inquiry: "Are you a person of good moral character?", and not otherwise. It may here be noted that section 3.24 of the Commission's rules provides that no application shall be granted without a satisfactory showing that the applicant is of good character.

A person's "character" is usually thought to embrace all his qualities and deficiencies regarding traits of personality, behavior, integrity, temperament, consideration, sportsmanship, altruism, etc., which distinguish him as a human being from his fellow men. His disposition toward criminal acts is only one of the qualities which constitute his character. The statute subjects an applicant's "character" to scrutiny by the Commission, in the absence of a legislative directive to the narrow interpretation advanced by plaintiffs, courts must give to words their commonly understood definitions and in this case "character" certainly embraces involvement in the litigation proved against the plaintiffs and their disposition not to be ingenuous and truthful concerning it.

However, we need not rest upon Section 308(b), which is primarily concerned with original applications for radio licenses. It is Section 310 which imposes the necessity of Commission consent to the transfer of a license. In empowering the Commission to decide whether the transfer is in the public interest, that section provides for such determination "after securing full information." No specification is made limiting the source from which such information is to be derived. "Full information" would encompass anything and everything which would or might affect the Commission's decision as to whether or not the public interest would be served. Inquiry into an applicant's character, as commonly understood, would certainly be material. An inquiry which concerned itself only with convictions for felony or of crimes involving moral turpitude would be grossly inadequate. It might indeed be most inadvisable from the public viewpoint to entrust the operation of a radio station to a person unworthy of belief and evidencing disregard for regulatory laws, even though he had never been convicted of a felony.

Thus, the scope of the inquiry here made by the Commission was clearly within the letter of its prescribed powers; that it was within the spirit of the Communications Act goes almost without saying. The conclusions of the Commission are well warranted by the evidence adduced at the hearing. Having reached these findings, this Court has no power to disturb the administrative determination made. Nor is it of any consequence that the Commission has upon other occasions accorded less significance to or even ignored completely the facts which here have induced denial of its consent to the transfer. An administrative agency may always change its mind and a person adversely affected thereby is not denied any rights without due process of law. Federal Communications Commission *v.* WOKO, Inc., U. S. Sup. Ct., December 9, 1946.

The third reason advanced by the Commission is not important in view of the disposition made herein concerning the other two but in passing it may be noted that it is unimpressive. The Commission has itself determined a number of times that an intending purchaser need not personally possess a familiarity with engineering or the other technical qualifications required properly to operate a radio station. As long as there is available to the purchaser a competent staff to handle these matters, no detriment to the public interest from the transfer is shown. Many of the large radio stations have been transferred to and are owned by persons who possess no technical knowledge of radio broadcasting whatever, nor of the Communications Act or regulations of the Commission. In its decision here, the Commission drew attention to the absence of any definite plans on the part of these transferees as to their future operation of the station and the non-existence of any contractual relationship which would insure the continuance of the present status, upon the basis of which it perceived a distinction from other instances. But the testimony of Murray Mester was to the effect that those presently employed would be retained or others at least as competent in the required skills would be procured. There can be no guarantee that a contract of employment will not be breached and its existence offers no greater assurance of a qualified staff than the intentions expressed by the trans-

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ferees here that they would not disturb the existing arrangement unless they contemplated some improvement. The distinction sought to be made by the Commission is without merit.

One last question has been raised by the defendants Bulova and Henshel, who are the present owners and intended transferors of radio station WOV. They suggest that this review should be dismissed upon the ground that the controversy is rendered moot by a provision in the contract of sale to the effect that the transfer and sale "is subject to the approval of the Federal Communications Commission." They argue that since the Commission has not granted its approval, the contract thereby became a nullity and cannot be revived even should this Court reverse the Commission and its approval subsequently be obtained. They seek to liken the clause to a condition in a contract concerning realty that the sale shall be subject to approval by a named title insurance company. The analogy has no efficacy. A title company may validly act as arbitrarily as it pleases and the parties are presumed to have contracted with the possibility in mind of an arbitrary refusal to insure the title. But the Federal Communications Commission has power to act only within the bounds of its authority and a determination which is not within such bounds is unlawful and a nullity and thus may not be presumed to have been a fact with reference to which the contract was made, unless that intent of the parties is unambiguously expressed. Every contemplated transfer of a radio station which is made the subject of contract must by law hinge upon a valid approval by the Federal Communications Commission. The parties here did no more than to incorporate that implication into their express agreement. The transfer which has been contracted for is still subject to the approval of the Commission and could not be effected without it. But no time is specified within which that approval must be procured, nor is it a part of the agreement that an improper disapproval by the Commission in the first instance should void the contract. The review before us is not moot.

Findings of Fact

1. This suit seeks to have a decision and order of the Federal Communications Commission adjudged unlawful and void and to have this Court set aside and enjoin the enforcement of said order. The Commission has moved for summary judgment denying the application and the defendants Bulova and Henshel have moved to dismiss the complaint upon the ground that the application is moot. Since there is no dispute as to the facts for the purpose of the matters before this Court, the findings of fact and conclusions rendered by the Commission on March 4, 1946, except number 13 of the findings, number 2 of the conclusions, and the reference in conclusion number 5 to technical qualifications, are adopted as the findings herein. There is substantial evidence in the record to support the said findings and conclusions.

Conclusions of Law

1. This court has jurisdiction to entertain the applications before it.

2. The application is not moot.

3. The Commission is not bound by determinations it may have made in the past in the cases of other applicants inconsistent with the conclusion reached herein.

4. It is within the province of the Commission's authority to determine that a transfer to a person who is not of good character is contrary to the public interest.

5. "Character" includes involvement in civil litigation and includes a person's disposition to be ingenuous and truthful.

6. It is not a prerequisite to the Commission's authority to investigate an applicant's general character that an all-inclusive inquiry concerning character shall appear on the application form.

7. The motion for summary judgment denying the application of the plaintiffs is granted and the motion of the

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defendants Bulova and Henshel to dismiss the complaint for mootness is denied.

GROVER M. MOSCOWITZ,
U. S. District Judge;
CLARENCE G. GALSTON,
U. S. District Judge.

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

February 4, 1947

MURRAY MESTER and MEYER MESTER, *Plaintiffs,*

against

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, ARDE BULOVA, HARRY D. HENSHEL, and RICHARD E. O'DEA, *Defendants*

Before Frank, Circuit Judge, and Moscowitz and Galston, District Judges

FRANK, *C. J.*, concurring:

I agree with all but one paragraph of the foregoing. It seems to me that the Commission's third reason was also, independently, a sufficient ground for its order. For I think it within the province of the Commission to make case-to-case determinations of the adequacy of the applicant's arrangements necessary to insure that the applicant will have a competent staff, if its application is granted. I think that the Commission could properly hold that the testimony of Murray Mester, to which my colleagues refer, gave insufficient assurance on that score, and that such a conclusion is not subject to judicial scrutiny.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 173

MURRAY MESTER AND MEYER MESTER,
Appellants,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

PHILIP J. HENNESSEY,
BERNARD NOSKIN,
Counsel for Appellants.

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UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

Civil Action No. 7106

MURRAY MESTER AND MEYER MESTER,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, ARDE BULOVA, HARRY D. HENSHEL, AND RICHARD E. O'DEA,
Defendants

REPLY BRIEF TO APPELLEES' MOTION TO AFFIRM

I

Appellees misconceive the basis of this appeal. The primary question tendered is the interpretation of the term, "character" as used in Sec. 308(b) of the Communications Act of 1934 in connection with the licensing powers of the Federal Communications Commission. The District Court concluded that in the absence of a legislative definition of this term "a person's character is usually thought to embrace all his qualities and deficiencies regarding traits of personality, behavior, integrity, temperament, consideration, sportsmanship, altruism, etc., which distinguish him as a human being from his fellow men." This definition of character comprehends the entire sphere of human conduct in relationship to good and evil, the obligation of duty and the principles of ethics; there is no human frailty or

weakness which is not covered by this definition. Congress never intended the Commission to apply so stringent a standard of fitness which bears no reasonable relationship to "bad character." The test for character heretofore employed has been "the commission of crime—the violation of the penal laws of a state. . . ." *Hawker* v. *People of New York*, 170 U. S. 189 (1898). Thus the Federal Alcohol Administration Act (Act of August 29, 1935, 49 Stat. 978, Act of June 30, 1940, 54 Stat. 1232, 27 U. S. C. A. Sec. 204(a)) specifies criminal misconduct as a statutory ground for denying a basic permit; and in the immigration and deportation of aliens (Act of Feb. 5, 1920, c. 29, 39 Stat. 875; Act of June 5, 1920, c. 243, 41 Stat. 981, 8 U. S. C. A., Sec. 136(e), and 155(a)) civil litigation is no ground for denying admission to or deporting aliens. See *United States ex rel. Mylius* v. *Uhl*, 2nd Cir. 1914, 210 Fed. 860 and *United States* v. *Carrollo* (D. C. W. D. Mo. 1939), 30 F. Supp. 3, 7. The State legislatures and courts apply a similar standard. *Gandy* v. *State*, 10 Neb. 243, 4 N. W. 1019 (1880); *Lovely* v. *Cockrell*, 237 Ky. 547, 35 S. W. (2nd) 891 (1931); *In Re Alameda County Bar Ass'n*, 35 Cal. App. 534, 170 Pac. 432 (1917); *In Re Conley*, 188 Minn. 575, 248 N. W. 41 (1933).

Assuming arguendo, that certain types of civil actions have a reasonable relationship to bad character, viz., fraud, monopoly, fraudulent convenance, etc., appellants' civil litigation bears no relevancy to any objective or subjective test of bad character. Appellants' civil litigation consisted of: (a) *in rem* actions; (b) stipulations; and (c) settlements out of court. By any objective standard, such civil litigation does not constitute evidence of bad character. Tested by a subjective standard, there is not one iota of evidence in this record to support the conclusion that appellants' activities with other Federal and State agencies was

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willful or deliberate. None of the agencies with which appellants were involved made any finding or conclusion as to appellants' intent. The Commission's conclusion that "many of the violations were not inadvertent" does not specify which matters of civil litigation were willful or deliberate. And the appellees' motion to affirm does not answer this contention for the obvious reason that the record is totally silent on this issue.

What the Commission did in this case was to retry the matters in which appellants had been involved with other agencies and arrive at conclusions which have no basis either in fact or law.

II

The administrative conclusion that the transferees' lack of candor in testifying under cross-examination on a matter not covered by the application forms manifested a "willingness to deceive" (Appellees' Brief p. 5) is erroneous and is not reflected in the Commission's final decision. In its proposed decision the Commission alleged that the transferees misrepresented and concealed the facts concerning their civil litigation with regulatory bodies. After argument, the Commission withdrew these findings.

This is not the only misstatement of fact set forth in the Commission's decision and appellees' motion to affirm.

The decision recites that "the transferees revealed an extreme lack of candor in testifying under oath as to their numerous difficulties with various governmental bodies." But with reference to Meyer Mester there is no evidence to support this conclusion. Meyer Mester did not testify on direct examination, nor was he cross-examined upon "their numerous difficulties with various governmental bodies."

Appellees in their motion at page 5 assert that the conclusions as to candor and reliability based on Murray Mester's testimony bind Meyer Mester since "these con-

clusions are made as to the proposed transferees as a partnership." But the record is unequivocal that appellants "took (equal interest in the stock) individually and personally and not as a partnership" (Tr. 265).

These erroneous conclusions of fact and law reflect a lack of attentive consideration to the evidence introduced at the hearing. *Saginaw Broadcasting Co.* v. *FCC*, 68 App. D. C. 282, 96 F. (2d) 554 (1938); *Securities Commission* v. *Chenery Corp.*, 318 U. S. 80 (1943). These erroneous factual allegations have a deeper vice. The conclusions obtained from the foregoing factual errors have distorted the record to the prejudice of appellants and thus denied them a fair hearing within the meaning of the Constitution.

III

Appellees misconceive the seventh assignment of error which recites that the Commission's action violated the Fifth Amendment since the test of qualifications based on civil litigation has not been applied uniformly with reference to other licensees and transferees approved by the Commission both *prior* to and *subsequent* to the hearing in this case. In *FCC* v. *WOKO, Inc.*, 329 U. S. 223 (1946) the Supreme Court held that the Commission was not bound by its previous decisions or policies in its adjudicatory functions. But the question of law tendered by this assignment of error is whether the Commission can single out the appellants and apply an exclusive standard of fitness which is not made applicable to other transferees and applicants. Prior to this decision the Commission granted applications to persons convicted of a felony. *In Re Thomas*, 5 FCC 84 (1938), 7 FCC 108 (1939); contemporaneously with this decision, it approved a transfer to a corporation involved in civil litigation with the Food and Drug Administration and other Federal agencies. *In Re application of Scripps-*

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Howard Radio, Inc., transferor and Plough, Inc., transferee for Transfer of Control of WMPS, Inc., licensee of Station WMPS, Memphis, Tennessee (FCC File No. B3-TC-411); subsequent to this decision applications for broadcast licenses have been granted to persons violating the liquor and gambling laws of a State, State lottery laws and the statute and regulations of the OPA (*Re Jones, et al.* (B-273, decided April 9, 1947), — FCC —;) *Re Abilene Broadcasting Company, et al.* (B-345, Proposed Decision, decided March 31, 1947); *Re Air Waves, Inc., et al.* (B-227, decided March 20, 1946), — FCC —.)

This is the *only* case since the inception of Federal regulatory control over communications wherein the Commission has denied an application because of appellants' record of civil litigation. The application of this standard only to the appellants but not to previous and subsequent transferees and applicants constitutes an arbitrary and unequal application of the law contrary to the Fifth Amendment.

But the deeper vice is the prejudicial action reflected by this action. "The Commission cannot announce the applicability of a formula and then distort its application by failure to find accurately the factors required by the formula, or by departing from the essential progress of the formula from premise to conclusion. When the Commission announced principles or formulae as applicable, the validity of its order can be determined only by measuring what it does against the principles it announces. This is so not only upon the authority of *Securities Comm'n* v. *Chenery Corp.* (318 U. S. 80 (1943)), but because any other course would permit an administrative agency to announce a proper principle and under that protection, achieve an improper result by unrevealed considerations wholly apart from the announcement." *Mississippi River Fuel Co.* v.

The Federal Power Commission, U. S. Ct. of Appeals, D. C., No. 9181, decided May 28, 1947.

IV

This case also tenders an important issue under the First Amendment. The Commission's action in this case has denied appellants access to an important medium of communications because of their purported character. Freedom of speech means that the avenues of communication are open to all for the expression of their views. The test of character as it was employed by the Commission and affirmed by the District Court constitutes an unconstitutional restriction on the right to engage in interstate communications. *Abrams* v. *United States*, 250 U. S. 616, 630 (1919); *Hannegan* v. *Esquire*, 327 U. S. 146 (1946).

MURRAY and MEYER MESTER,
By PHILIP J. HENNESSEY, JR., (H. P. W.)
816 Connecticut Avenue,
Washington 6, D. C.;
BERNARD NOSKIN, (H. P. W.)
16 Court Street,
Brooklyn, New York,
Attorneys for Plaintiffs-Appellants.

June 17, 1947.

In the District Court of the United States for the Eastern District of New York

CIVIL ACTION NO. 7106

MURRAY MESTER AND MEYER MESTER, PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, ARDE BULOVA, HARRY D. HENSHEL, RICHARD E. O'DEA, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, United States of America and Federal Communications Commission, pursuant to Rule 12, paragraph 3, move that the judgment of the district court be affirmed.

This is a direct appeal from the final judgment, dated March 27, 1947, of a specially constituted district court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913 (28 U. S. C. 47) as extended by Section 402 (a) of the Communications Act of 1934 (47 U. S. C. 402 (a)), granting the motion of the defendant-appellees, United States of America and Federal Communications Commission, for summary judgment dismissing the complaint of plaintiff-appel-

lants, Murray Mester and Meyer Mester, to set aside an order of the Federal Communications Commission. The Commission's decision, on March 4, 1946, refused consent to the transfer of control of Wodaam Corporation, licensee of radio station WOV, New York City, New York, from defendant-appellees Arde Bulova and Harry D. Henshel, to plaintiff-appellants, Murray and Meyer Mester. Application for the consent of the Commission was made pursuant to the provisions of Section 310 (b) of the Communications Act of 1934, as amended (47 U. S. C. 310 (b)).[1]

The court entered a written opinion together with findings of fact and conclusions of law on February 4, 1947. Thereafter, the court entered a final judgment granting the motion of defendant-appellees, United States of America and Federal Communications Commission, for summary judgment dismissing the complaint, on March 27, 1947. An appeal was allowed on May 25, 1947, and personal service of the appeal papers was made upon defendant-appellees on May 27, 1947.

---

[1] This section provides:

"The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission, shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing."

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The pertinent facts, as they appear from the decision of the Commission and the decision of the court, are as follows:

On February 8, 1944, plaintiffs and defendants Bulova and Henshel filed with the Commission an application for the transfer of control of Wodaam Corporation to be effected by the sale of Bulova and Henshel's stock interests in that corporation to the plaintiffs pursuant to contracts between the parties. On May 9, 1944, the Commission designated the application for hearing on issues set out in the notice of designation for hearing released on May 27, 1944. Among the issues specified in the notice of designation for hearing was the following:

> 1. To obtain full information with reference to the qualifications of the proposed transferees.

The hearing was held on July 6 and 7, 1944, before Commissioner C. J. Durr. Testimony on behalf of the transferees was given principally by Murray Mester.

At the hearing, Murray Mester was examined concerning difficulties with federal and state regulatory agencies in which he and the Balbo Oil Company, owned by his brother, Meyer Mester, and himself, were involved. From exhibits offered in evidence and from Murray Mester's testimony, it appeared that between 1933 and 1944, there were five condemnations by federal food and drug authorities because of misbranding

and mislabelling involving products shipped by Murray Mester individually, and products packed and shipped by the partnership; two cases involving condemnation of a shipment in the state of Connecticut by federal and state authorities because of shortages in volume; a stipulation entered into with the Federal Trade Commission to cease and desist from making certain representations in the advertising of their product; and a suit brought by the O. P. A. alleging sale of oil at over ceiling prices, and failure to keep required records, which was settled by the payment of about $3700. In the case of one of the judgments of condemnation involving a product called "La Deligiosa" Oil, Murray Mester gave testimony which conveyed the impression that he was not at all involved in that matter. And on the basis of that testimony, the notice of judgment which had been offered in evidence was withdrawn. Subsequent cross-examination, however, disclosed that the judgment did relate to a product which he had shipped. In context, the testimony reveals that the initial failure to identify the judgment was not the result of inadvertence or a lapse of memory, but was rather a calculated attempt to mislead the Commission.

After submission of proposed findings of fact and conclusions, the Commission issued its proposed decision on March 28, 1945. Exceptions were filed by the transferees, and oral argument was held before the Commission on July 25, 1945.

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On March 4, 1946, the Commission adopted its final decision denying its consent to the proposed transfer of control. On the basis of the evidence presented at the hearing, the Commission made findings of fact from which it concluded that the plaintiffs have no adequate conception of the public responsibilities of a station licensee which they are seeking to assume; that at the hearing the transferees revealed an extreme lack of candor in testifying under oath as to their numerous difficulties with various governmental bodies; and that the transferees in the conduct of their business have violated and disregarded applicable laws of the States and of the Federal Government. The Commission therefore concluded that the transfer of control of plaintiffs would not serve the public interest, convenience, or necessity since the transferees have not established adequate technical, character, and other qualifications to convince the Commission that they are capable of being entrusted with the duties and privileges inherent in a radio station license.

The district court held that the Commission's findings that the transferees were not possessed of a sense of public responsibility and that the testimony concerning their difficulties with governmental agencies revealed an extreme lack of candor were supported by substantial evidence, and afforded an ample basis for the Commission's conclusion that approval of the transfer of control to plaintiffs would not serve the public

interest.[2] The court held that the character qualification prescribed in Section 308 (b) of the Communications Act (47 U. S. C. 308 (b)) reasonably includes "involvement in the litigation proved against the plaintiffs and their disposition not to be ingenuous and truthful concerning it"; and that the Commission may take such matters into consideration in passing on the qualifications of a proposed transferee when they are disclosed at a hearing, even though no questions concerning them appear in the application forms.

Appellants contend that the conclusions of the Commission relating to their want of candor in testifying, and their lack of a sense of public responsibility in the conduct of their edible oil business, as manifested by their record of civil litigation, are not supported by substantial evidence, and are arbitrary and capricious. These contentions have, however, been fully considered by the Court below, and it is manifest from the Court's decision, the Commission's decision and

[2] The three judges of the statutory court agreed that the want of the requisite character qualifications provided a sufficient basis for the Commission's conclusion. The late Judge Moscowitz and Judge Galston held that the Commission's finding that the plaintiff's did not possess the requisite technical qualifications was unsupported, but observed in the opinion of the court that "The third reason advanced by the Commission is not important in view of the disposition made herein concerning the other two * * *." Circuit Judge Frank was of the view that this conclusion was supported by the evidence, but otherwise agreed with the decision of the court, rendered by the late Judge Moscowitz.

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the record of the hearing on which it was based that no substantial reason exists for reexamining the judgment of the court below.

Appellants urge that the Commission did not find that appellants misrepresented and concealed facts, but found only an extreme lack of candor. The Commission's findings and the supporting evidence, however, make it clear that Murray Mester, in testifying for appellants attempted to mislead and create a false impression. That he ultimately did not succeed does not detract from a finding that the "willingness to deceive" was manifested. And the decision of this Court in *Federal Communications Commission* v. *WOKO, Inc.*, 329 U. S. 223, leaves no doubt that the failure of an effort to deceive cannot detract from a finding of want of character qualifications when the disposition to deceive is clearly manifested.

Appellants also urge that there is no evidence in the record to support this finding as to Meyer Mester. No substantial issue is raised by this contention. It clearly appears from the record and the Commission's findings that Murray and Meyer Mester, who were co-partners in the oil business, were applying for consent for the proposed transfer as co-partners. Murray Mester was the principal witness in behalf of the transferees, as the record clearly reveals. And it is not the case, as appellants assert, that Meyer Mester was not examined at all concerning "their

numerous difficulties with various governmental bodies." For on cross-examination, Meyer Mester's attention was called to Murray Mester's testimony concerning these matters, and he was asked whether he could recall any other violations besides those mentioned, and he stated that he could not. He was also asked whether during that time he was interested in the companies involved, Modern Packing Company and Balbo Oil Company, and he stated that he had been since June or July of 1933. Since it is clear from the Commission's decision that the conclusions as to candor and reliability are based on Murray Mester's testimony, and that these conclusions are made as to the proposed transferees as a partnership, under these circumstances the want of additional qualifying language to make these facts clearer certainly does not vitiate the Commission's decision.

Appellants also urge that there is no substantial evidence to support the Commission's conclusion that "The transferees, in carrying on their edible oil business have violated and disregarded the regulatory laws of the states and the federal government. * * * The violations have been numerous and extended over their entire business career. * * * Many of these violations were clearly not matters of inadvertence." In this connection appellants appear to make two arguments: that in the light of the volume of business conducted and the time period involved,

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the violations were not numerous; and that the Commission failed to make any finding that the violations were wilful. But nine cases of law violations, eight of which involve misrepresentations of various sorts, are certainly sufficient in a proceeding relating to appellants' character.

The second argument is that a finding of want of requisite character qualification cannot reasonably be based on a record of civil litigation where sanctions may be applied without establishing intent or wilfulness. Thus, the conclusion is invited that only criminal convictions may reasonably afford a basis for a finding of the want of requisite character qualification. The District Court fully considered this contention and reached a conclusion that character qualification is not limited to questions concerning prior criminal convictions but may also reasonably extend to involvement in civil litigation of the type presented in this case. The decision of this Court in the case of *Ma-King Products Co.* v. *Blair,* 271 U. S. 479, lends support to the conclusion that a finding of the want of requisite character qualifications may be reasonably based on matters other than convictions of crime. It may be noted that the Commission did not rely upon the bare record of the judgments and stipulation alone. For appellants were afforded an ample opportunity at the hearing to explain the nature of the matters leading to the judgments and the stipulation, and to afford an explanation. And

their testimony lends support to the Commission's conclusion that many of the violations were clearly not matters of inadvertence.

Appellants also contend that the Commission has not applied the same standard of disregard of regulatory laws in other cases. However, as the decision of this Court in the case of *Federal Communications Commission* v. *WOKO, Inc.*, 329 U. S. 223, makes clear, the question to be determined on the appeal is whether the Commission acted within its statutory authority and whether substantial evidence exists to support its conclusion. Whether or not the Commission should have denied consent in other cases where it granted it is not a question which this Court is in a position to dispose of on this appeal.

For the foregoing reasons it is respectfully submitted that the judgment of the District Court should be affirmed.

GEORGE T. WASHINGTON,
Acting Solicitor General.
BENEDICT P. COTTON,
General Counsel,
Federal Communications Commission.

U. S. GOVERNMENT PRINTING OFFICE: 1947

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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 173

MURRAY MESTER AND MEYER MESTER,
Appellants,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK

PETITION FOR REHEARING AND BRIEF IN SUPPORT

PHILIP J. HENNESSEY, JR.,
BERNARD NOSKIN,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 173

MURRAY MESTER AND MEYER MESTER,
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vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK

PETITION FOR REHEARING AND BRIEF IN SUPPORT

A. Petition for Rehearing.

Murray Mester and Meyer Mester respectfully petition this Court for rehearing of their appeal herein. By a per curiam order dated October 13, 1947, the judgment of a statutory court, convened under the Urgent Deficiencies Act in the Eastern District of New York, was affirmed on the basis of *Federal Communications Commission* v. *WOKO, Inc.*, 329 U. S. 223.

Appellants respectfully submit that the WOKO case is neither applicable nor controlling with respect to the meaning of the word "character" as used in Section 308(b) of the Communications Act of 1934.

B. Brief in Support.

1. *There was no concealment.* Section 312(a) of the Communications Act of 1934 specifically, and in precise language, authorizes the Commission to deny a license "for false statements either in the application or in the statement of fact which may be required by Section 308 hereof. . . ." The Commission and this Court found in the WOKO case that there had been false statements wilfully and continuously made in applications filed with the Commission over a 12-year period on behalf of WOKO, Inc.

In this case, the Commission does not contend that any of the responses supplied by Murray Mester or Meyer Mester to the questions appearing upon the Commission's application form was false or misleading.

The decision in this case, therefore, cannot rest upon Section 312(a) of the Act as did the decision in the WOKO case.

Indeed, this record clearly establishes that all statements filed by appellants with the Commission were meticulously accurate and that the Commission had knowledge, both constructive and actual, well in advance of the hearing, of appellants' "numerous difficulties with various governmental bodies." (O'Dea Petitions to Intervene, R. 138, 154; Testimony of Leonard Marks, Commission counsel before the Select Committee to Investigate the Federal Communications Commission under H. R. 21, 78th Congress, 2nd Session (1944) p. 2929 et seq.).

2. *There was no disposition to conceal or deceive.* In the absence of any concealment or deception, the Commission justifies its denial of appellants' application upon what it calls their "lack of candor." Upon this finding of "lack of candor," it bases the conclusion that appellants are so

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singularly untrustworthy that they cannot be entrusted with control of a corporation licensed to broadcast. .

The Commission's Motion to Affirm in this Court at page 3 cites only one illustration of Murray Mester's purported "lack of candor." It warrants critical examination.

The Commission says "In the case of one of the judgments of condemnation involving a product called La Deliziosa Oil, Murray Mester gave testimony which conveyed the impression that he was not at all involved in that matter." The exact question and answer appear at page 342 of the record:

> "Question: (By Mr. Marks)—Is it your position that the notice referred to is not of the product which you manufactured?
> "Answer: (By Murray Mester)—Definitely."

Elsewhere in the record and exhibits introduced at the hearing, it is established that Murray Mester did not manufacture La Deliziosa Oil though he did ship some in interstate commerce. Admittedly, this question and answer are taken from a context which discloses a failure of the witness and counsel to understand each other's objectives.

Whether such testimony demonstrates a lack of candor or merely the confusion of a witness under harsh cross-examination cannot readily be determined from a stenographic transcript (though all the Commissioners except Mr. Durr who participated in this decision relied upon the transcript of testimony) but, in any event, there is a clear distinction between lack of candor and intention to deceive.

3. *Under the lower Court's definition of "character", there is no limitation upon the Commission's discretion.* If the assumption is once made that broadcast licenses may be denied to anyone whose character does not meet the approval of the Commission, then there are no discernable boundaries to the Commission's authority. The Court below made this assumption and said:

> "A person's 'character' is usually thought to embrace all his qualities and deficiencies regarding traits of

personality, behavior, integrity, temperament, consideration, sportsmanship, altruism, etc., which distinguish him as a human being from his fellow men."

We respectfully submit that neither the Communications Act nor the First Amendment countenances a limitation of licenses in this field to persons whose character, thus defined, is able to pass the scrutiny of a federal agency (*National Broadcasting Co. Inc.* v. *United States*, 319 U. S. 190, 227, dissenting opinion of Mr. Justice Murphy and Mr. Justice Roberts).

Respectfully submitted,

PHILIP J. HENNESSEY, JR.,
816 Connecticut Avenue
Washington 6, D. C.

BERNARD NOSKIN,
16 Court Street
Brooklyn, New York

Attorneys for Plaintiffs-Appellants

November 6, 1947

CERTIFICATE OF COUNSEL.

It is hereby certified that the foregoing Petition for Rehearing is presented in good faith and not for delay.

PHILIP J. HENNESSEY, JR.,
816 Connecticut Avenue
Washington 6, D. C.
Attorney for Plaintiffs-Appellants

PROOF OF SERVICE.

DISTRICT OF COLUMBIA: ss

I, Keo H. Goss, being duly sworn on oath depose and say that I have this 6th day of November, 1947, mailed copies of this Petition for Rehearing and Brief in Support to:

Philip B. Perlman, Esq.
Solicitor General of the United States
Department of Justice
Washington, D. C.

Max Goldman, Esq.
Federal Communications Commission
Washington, D. C.

Sanford Cohen, Esq.
565 Fifth Avenue
New York, New York
Attorney for Arde Bulova and Harry D. Henshel

Warren and McGroddy, Esq.
39 Broadway
New York, New York
Attorneys for Richard E. O'Dea

KEO H. GOSS.

Subscribed and sworn to before me this 6th day of November, 1947. My commission expires November 30, 1947.

EDITH Z. MILLER,
Notary Public.

(SEAL)

No. 173. MESTER ET AL. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Eastern District of New York. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Federal Communications Comm'n* v. *WOKO*, 329 U. S. 223. MR. JUSTICE BLACK took no part in the consideration or decision of this case. *Philip J. Hennessey, Jr., Paul M. Segal, Bernard Noskin* and *Harry P. Warner* for appellants. *Acting Solicitor General Washington* for the United States and the Federal Communications Commission; *Sanford H. Cohen* for Bulova et al.; and *Lynne A. Warren* for O'Dea, appellees. Reported below: 70 F. Supp. 118.